

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| RICKY EUGENE ROSS, | § | |
| Petitioner, | § | |
| | § | |
| v. | § | CIVIL ACTION NO: H-06-3498 |
| | § | |
| NATHANIEL QUARTERMAN, | § | |
| Director of the Texas Department | § | |
| of Criminal Justice - Correctional | § | |
| Institutions Division, | § | |
| Respondent. | § | |

MEMORANDUM AND RECOMMENDATION

Petitioner Ricky Eugene Ross, an inmate of the Texas Department of Criminal Justice, has filed a federal petition for a writ of habeas corpus under 28 U.S.C. § 2254, which has been referred to this magistrate judge for report and recommendation. (Dkt. 4). Respondent has filed a motion for summary judgment. (Dkt. 9). The court recommends that Ross' application be dismissed.

Ross complains of due process violations committed during the course of his disciplinary proceeding.¹ Specifically, Ross challenges disciplinary case number 20060316678, in which he was punished with a loss of (1) forty-five days of recreational and commissary privileges; (2) forty-five days of cell restriction; and (3) a loss of ten days of good time. State prisoners seeking federal court review of a conviction pursuant to 28 U.S.C.

¹ Despite some ambiguous stray language in petitioner's memorandum of law (Dkt. 2), this court is satisfied that Ross does not intend to challenge his underlying conviction in this proceeding.

§ 2254 must assert the violation of a federal constitutional right. *Lawrence v. Lensing*, 42 F.3d 255, 258 (5th Cir. 1994). When a disciplinary proceeding is challenged, habeas corpus procedures are appropriate if the allegations concern punishment which may ultimately affect the length of an inmate's confinement. *See Cook v. Texas Dept. of Criminal Justice Transitional Planning Dept.*, 37 F.3d 166, 168 (5th Cir. 1994). Ross' loss of forty-five days of recreational and commissary privileges and forty-five days of cell restriction do not affect the length of Ross' sentence. Moreover, Ross was convicted of the second degree felony of indecency with a child by contact and is not eligible for mandatory supervision. Therefore, a loss of good time credits does not affect the duration of his sentence and in turn trigger due process protections. *See Sandin v. Conner*, 515 U.S. 472, 483-84 (1995). Furthermore, to the extent that the challenged disciplinary proceeding affects Ross' eligibility for parole, Ross cannot complain of a due process violation because there is no liberty interest in obtaining parole in Texas. *Orellana v. Kyle*, 65 F.3d 29, 32 (5th Cir. 1995).

Finally, Ross complains that was denied effective assistance of counsel. However, inmates do not have a right to either retained or appointed counsel in disciplinary hearings. *Baxter v. Palmigiano*, 425 U.S. 308, 315 (1976). Therefore, because Ross was not entitled to representation, he cannot complain about the adequacy of his counsel.

For the reasons discussed above, the court recommends that petitioner's application for writ of habeas corpus be denied with prejudice. The court further finds that Ross has not made a substantial showing that he was denied a constitutional right or that it is debatable

whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

Signed at Houston, Texas on May 14, 2007.

A handwritten signature in cursive script, reading "Stephen Wm Smith", written in black ink.

Stephen Wm Smith
United States Magistrate Judge